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No. 99-1070

IN THE
SUPREME COURT OF THE UNITED STATES

THE PEOPLE'S MOJAHEDIN ORGANIZATION OF IRAN,

Petitioner,

v.

UNITED STATES DEPARTMENT OF STATE and
MADELEINE K. ALBRIGHT, Secretary of State,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONER

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INTRODUCTION

Our petition argues that the D.C. Circuit's disclaimer of "any ability to evaluate the facts that underlay the agency's decision" to designate a "foreign terrorist organization" amounts to a rubber stamp of the Secretary's designation. Pet. at 7. The government agrees that the D.C. Circuit eschewed any responsibility to evaluate the quality of the information supporting the agency's factfinding, but argues that such abdication is appropriate. Opp. at 10. The government, however, fails to square its concept of "some judicial scrutiny" (*id.* at 8), or "*some* review" (*id.* at 10) with the Statute and Article III. It fares no better in its defense of the standard used to determine constitutional presence. Most tellingly, the government does *not* dispute any of our reasons for asserting that the issues presented are important. *See* Pet. at 27-29. The Petition should therefore be granted.[1]

1. The Judicial Review Standard – The Petition demonstrates that the lower court's judicial review standard is inconsistent with the standard for review of Executive Branch factfinding in such contexts as search and arrest warrants and APA adjudications. The government does not dispute *any* of these inconsistencies. Claiming instead that review of Section 1189 designations should not afford the same protections, it implicitly acknowledges that its concept of "some review" will not provide the designated organization with any *meaningful* judicial review of the Secretary's finding of terrorist activity. It nowhere explains how its position squares with the legislative history that shows Congress adopted § 1189(b)(3), because it wanted to provide a meaningful judicial check against arbitrary

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[1] The government makes intentionally inflammatory allegations in its "Statement," including claims that PMOI "participated" in the embassy takeover and was "responsible" for killing Americans. Opp. at 5. These allegations were hotly contested by PMOI and were not found to be true by the court below. They provide no basis to deny the Petition.

"terrorist" designations. Pet. at 12-14 and 16 n.9. Congress clearly did *not* intend to create "ineffectual" review.[2]

The plain language of the Statute contradicts the government's position. The Statute's review provision tracks the five-tiered structure of the APA judicial review provision. *Compare* 8 U.S.C. § 1189(b)(3), with 5 U.S.C. § 706(2). In this context, the most natural construction of the "substantial support" requirement is that Congress intended to incorporate the type of judicial review exemplified by the APA's "substantial evidence" requirement. Indeed, the legislative history of the statute – which the government does *not* contest – confirms that Congress intended that the stringency of judicial review under each of the "substantial support" and "substantial evidence" standards in substance be equivalent. Pet. at 13 n.5.[3]

PMOI does not contest the government's claim that the Secretary may rely on materials not admissible in a judicial proceeding. Opp. at 12. It argues, however, that such reliance must be accompanied by meaningful indicia of reliability and probative value. Pet. at 15. Police officers, who may also rely on hearsay to make stops, arrests and searches, are still subject to review for reasonableness based

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[2] In *Humanitarian Law Project v. Reno*, No. 98-56062 & 98-56280, 2000 WL 235310 at 5* (March 3, 2000) the Ninth Circuit in dicta stated: "although plaintiffs complain that [§ 1189] review is ineffectual, because of the degree of deference accorded to the Secretary's decision, that is a necessary concomitant of the foreign affairs powers." The government omits the "ineffectual" phrase in its quote. Opp. at 8 n.3.

[3] The government seeks to escape the explicit language of the statute's judicial review provision by seizing on a footnote in the lower court's opinion which only speculated that the Congress substituted the word "support" for "evidence" because the statute does not provide for a formal "adversary adjudicative type procedure." Pet. at 14a, n.8. But the government never explained Congress' explicit choice to *add* the "substantial support" standard, even though the Statute already had the "arbitrary and capricious" standard. Pet. at 14, n.7.

on the reliability of their information. *See* Pet. at 10-11; *cf. Florida v. J.L.*, 2000 WL 309131, – U.S. – (Mar. 28, 2000) (*Terry* stop of juvenile carrying a gun invalid when based solely on anonymous tip). Nothing in the government's brief explains why the Secretary of State, any more than a policeman or an ALJ, should be allowed to take action against alleged terrorist organizations without any independent judicial check on the reliability of the information alleged to support her designation.

Certainly, the government's peculiar argument based on the unilateral and *ex parte* "manner in which a Section 1189 administrative record is compiled" (Opp. at 10) fails to provide any rational basis for the government's position. A policeman's search and arrest record is also compiled unilaterally and *ex parte*; far from justifying ineffectual judicial review, this Court has made clear that those very features of the "record" require judicial scrutiny of the reliability of the information used by the Executive Branch. This point has even more force when applied to the Secretary's "administrative record," given the political context in which it is created. Pet. at 17. Nor does the government provide any support for its contention that the non-justiciability of the national security finding raises "[s]imilar concerns" that somehow justify emasculated review of the factual terrorist activity finding. Opp. at 10.

2. The Article III Rubber-Stamping Issue – The government contends that the lower court merely engaged in "highly deferential" judicial review and did not act as an unconstitutional rubber stamp. Opp. at 8. The government compares its "some review" standard to the "rational basis" test the Court applies to determine the constitutionality of legislative classifications under the Equal Protection Clause. Opp. at 9 n.4 (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)). The government confuses the Article III judicial role in reviewing Executive Branch adjudicative factfinding with the courts' very different role

in reviewing legislative policy choices. Indeed, the Court has "explicitly rejected use of [the equal protection judicial standard of review] ... in the context of statutory review of agency findings of fact." II K. Davis, Administrative Law Treatise, § 11.4 at 201 (3d ed. 1994); *Motor Vehicle Mfg. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 n.9 (1983) (rejecting the "minimum rationality" constitutional test).[4]

Under the Statute, the Secretary's designation must be based on "findings" supported by a "factual basis," 8 U.S.C. § 1189(a)(2)(A)(1), set forth in an "administrative record." *Id.* § 1189(a)(3)(A). The "facts," as "found" by the Secretary, are only as good as the quality of the information in her record. Therefore, it is impossible for the judiciary to make *any* judgment concerning the Secretary's adjudicated "facts" without evaluating the quality of the information on which she relied. Yet the government admits that, under the lower court's construction of the statute, all judicial evaluations of the quality of the information on which the Secretary adjudicated her "facts" *is forbidden*. Opp. at 10.

The government completely ignores this Court's rejection of statutory interpretations that "cast Article III judges in the role of petty functionaries, [] required to enter as a court judgment an executive officer's decision, but stripped of capacity to evaluate independently whether the executive's decision is correct." *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 426 (1995). *That is precisely what the Statute does*, as construed by the government and the lower court. The Statute, as thus construed, compels the

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[4] *Mathews v. Diaz*, 426 U.S. 67 (1976) and *Kleindienst v. Mandel*, 408 U.S. 753 (1972), do not support the government's "some review" standard. *Mathews* addresses a legislative classification. In *Kleindienst*, there was no statutory right of judicial review and the Court based its affirmance on a record that included uncontradicted affidavit testimony supporting the alien exclusion at issue. 408 U.S. 769.

federal courts "to enter as a judgment" the Secretary's finding of "terrorist activity," but strips them of any "capacity to evaluate independently" whether the finding is supported by any information of quality. Such a statute, under *Gutierrez de Martinez*, constitutes "Congress[ional]... assign[ment] to the federal court only [of] rubber stamp work." *Id.* at 429.[5]

3. The PMOI Military Wing – The government argues that PMOI's lower court brief conceded that it engages in terrorist activity, because it "maintains an army (the National Liberation Army of Iran), and it carries out missions within Iran against military and strategic targets." Opp. at 12 (quoting Pet. CA Br. 27). Leaving aside PMOI's point that military force against oppressive governments does not, *ipso facto*, constitute terrorism, the Statute does not permit the Secretary to make designations of "terrorist activity" on the basis of maintaining an "army" or carrying out "missions." Rather, it demands a "factual basis" for specific defined

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[5] Our argument does not necessarily mean that Congress could never authorize "foreign terrorist" designations without any judicial participation at all. As the Court in *Gutierrez de Martinez* observed, while "Congress may be free to establish a compensation scheme . . . without court participation," "that is a matter quite different from instructing a court automatically to enter a judgment pursuant to a decision the court has no authority to evaluate." 515 U.S. at 430. Because Congress here has chosen to create a statutory right to judicial review of the "factual basis" for the Secretary's designation, Article III requires that the federal courts be able to "evaluate independently" the quality of the information in support of it. *Id.* at 426.

The government attempts to distinguish the search and arrest cases that prohibit judicial rubber stamping, Pet. at 10, on the ground that the constitutional right to an independent judicial evaluation of the factual basis for police conduct is derived from the Fourth Amendment. Opp. at 9. But the Fourth Amendment is merely the source of the right of review, just as § 1189 grants the right of review to PMOI. *Gutierrez de Martinez* makes clear that the independence of the review is required by Article III.

terrorist acts. 8 U.S.C. § 1189(a)(1)(B). None of Petitioner's briefs in the Court of Appeals admits any of the terrorist acts upon which the Secretary's designation (and the D.C. Circuit's affirmance) depends. Indeed, the same brief quoted by the government asserts that PMOI "eschews terrorism and violence against innocent civilians, it supports the Middle East Peace Process, it claims no credit for acts of international terrorism." Pet. CA Br. 6.[6]

Moreover, it is impossible from the Secretary's administrative record to determine whether, if the sole allegations of "terrorist activity" involved military operations of the NLA in Iran, she would have still designated PMOI as a foreign terrorist organization. The government certainly makes no such claim in this Court. On judicial review, the agency's action must "stand or fall" on the "determinative reason" for the action taken.[7] *Camp v. Pitts*, 411 U.S. 138, 142-43 (1973). *See also FTC v. Sperry & Hutchinson Co.* 405 U.S. 233, 248-50 (1972) (remand to Commission required where factual findings not linked to Commission's conclusion); *Port of Portland v. United States*, 408 U.S. 811, 842 (1972); *American Trucking Ass'n v. United States*, 364 U.S. 1, 13-14 (1960).

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[6] The government cannot save the Secretary's "terrorist activity" finding by relying on alleged "admissions and claims of responsibility for terrorist attacks made by MEK officials" set forth in the SAR. *See* Opp. at 11 n.5. The Court of Appeals did not assess the reliability of any of the documents in the SAR, including those cited by the government, and PMOI categorically denied any participation in terrorist activity.

[7] The government emphasizes that "in deciding whether violent foreign organizations should be treated as terrorist, responsible officials in the political branches must make nuanced assessments of a variety of moral, practical and political considerations." Opp. at 12-13. These "nuanced" judgments cannot be made unilaterally by appellate counsel. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962); *SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943).

4. The Constitutional Presence Issue. The government convolutes the second question presented by PMOI (whether PMOI has sufficient contacts to obtain review of its constitutional claims), by re-framing it as two issues on which the D.C. Circuit deliberately did not pass (whether PMOI's due process and First Amendment challenges have merit). The D.C. Circuit, not this Court, is the appropriate forum to adjudicate those claims in the first instance. Nothing in the government's opposition adequately meets PMOI's point that the D.C. Circuit's test for constitutional presence is inconsistent with this Court's decisions.

(a) The government mischaracterizes the lower court's opinion when it argues that the court's holding that PMOI lacks presence was based on the record as a whole. Opp. at 14. In context, it is clear that the transition phrase "[f]rom all that appears" refers to PMOI's concession of its "status as foreign," as described in the following sentence of the court's opinion (Pet. App. at 10a), and not to the record – of which the court made no mention at all. Even the government seems skeptical that the lower court considered the entire record when it asserts that the D.C. Circuit may reconsider PMOI's constitutional presence in the case challenging the re-designation, based on information already in the record of *this* proceeding that points to PMOI's ample presence in the United States. Opp. at 14 n.6; Pet. at 20-21.[8]

(b) The government is wrong to imply that the D.C. Circuit made a factual finding that PMOI had no property in

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[8] The government's claim that we cannot assert facts in the record in support of our argument lacks merit. Opp. at 14, n.6. PMOI did specifically draw the most important of those facts to the attention of the D.C. Circuit – that it regularly reports its activities in the United States to the Department of Justice, including "presentation of speakers, issuance of periodicals and other publications, hosting news conferences, [and] organization of rallies." PMOI CA Br. at 5; CA Pet. for Reh'g at 9. All the other citations merely add support to its contention that it is present here.

the United States. Opp. at 14-15. The Court "inferred" only that no PMOI property had been *seized* from an American financial institution. *Id.*; Pet. App. at 10a. The latter finding is not sufficient for the D.C. Circuit to have disregarded all of PMOI's constitutional claims, and provides no basis for distinguishing *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489 (1931), which was based on "acquiring and holding" property in the United States.

(c) The government claims that PMOI should be equated with foreign nations and denied any right to raise constitutional claims regardless of presence in the United States. Opp. at 15 (citing *Regan v. Wald*, 468 U.S. 222 (1984)). *Regan* does not stand for the proposition that foreign nations can never invoke the American constitution, much less that a foreign private organization may not. *Compare Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992) (conducting "minimum contacts" analysis under due process clause). In any event, PMOI does not purport to be a foreign nation, but rather a private organization with its own policy objectives. This Court has articulated the touchstone of the ability of any foreign organization to assert constitutional claims as whether it has property or presence here – questions that the D.C. Circuit did not properly resolve in accordance with this Court's precedents.

(d) The government's argument that PMOI's constitutional claims lack merit should have no bearing on this Court's decision to grant certiorari, because it is not encompassed in the questions presented, was not resolved even implicitly by the court below, and is, in any event, wrong. The Secretary's designation affects both liberty and property interests, and presents colorable claims under the First Amendment. (1) The designation restricts the liberty of PMOI members living in the United States to travel abroad. *Zemel v. Rusk*, 381 U.S. 1, 14 (1965). The exclusion effect of the designation applies not only to aliens seeking "initial admission" to the United States, Opp. at 16,

but also to lawful resident aliens who wish to travel abroad and obtain a visa to return to the United States. 8 U.S.C. § 1182(a). (2) The designation further affects the liberty of members who wish to provide support to PMOI, whose common interests the membership organization has standing to assert. *United Food & Commercial Workers Union Local 751 v. Brown Group. Inc.*, 517 U.S. 544, 551-52 (1996); *Pennell v. City of San Jose*, 485 U.S. 1 (1988).[9] (3) The D.C. Circuit's erroneous finding that none of PMOI's property had been seized does not answer the question whether PMOI asserted the deprivation of a constitutionally protected interest. The designation provides that any of PMOI's property that is placed in U.S. financial institutions will be seized, thereby depriving PMOI at this time of the use of American channels of interstate commerce available to others. *Cf. Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978) (restriction of access to utilities is a protected interest). (4) The decision of the Ninth Circuit in *Humanitarian Law Project*, the only circuit to have addressed the First Amendment association claim under this recent Statute, hardly constitutes the final word on the subject. Even if it did, there is no suggestion from that decision that the parties in that case raised, or that the Court decided, all of the constitutional claims that were asserted by PMOI below.

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[9] To say that a liberty interest exists is not to say that it may not be proscribed pursuant to procedures that comport with due process. PMOI does not assert that the government has no power to restrict financial contributions to bona fide terrorists. But members of PMOI in criminal or immigration proceedings have no practical way to obtain collateral review of the question whether PMOI does, in fact, engage in terrorist activities in a manner that guarantees due process. PMOI was denied such a hearing by virtue of the court's holding that it has no constitutional presence; its members cannot obtain a hearing on the issue if charged under the criminal statute. 8 U.S.C. § 1189(a)(8).

CONCLUSION

For the reasons stated herein and in the Petition, the Court should grant the Petition and set the case for argument or summarily reverse and remand to the D.C. Circuit.

Respectfully submitted,

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